

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
ONE MANHATTAN WEST
NEW YORK, NY 10001

TEL: (212) 735-3000

FAX: (212) 735-2000

www.skadden.com

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DIRECT DIAL
(212) 735-2588
DIRECT FAX
(917) 777-2588
EMAIL ADDRESS
JESSICA.DAVIDSON@SKADDEN.COM

November 19, 2024

VIA ECF

The Honorable Thomas Vanaskie
Stevens & Lee
1500 Market Street, East Tower
18th Floor
Philadelphia, PA 19103

RE: Roberts Case Management Order

Dear Judge Vanaskie:

I am writing with regard to the scheduling and sequencing of discovery in the *Roberts* case. As we noted last week, the parties are in agreement with respect to most of the schedule; however, we request the Court's assistance in addressing one narrow dispute regarding the sequencing of expert discovery. Specifically, Defendants seek to depose Plaintiff's experts before defense expert reports are due, while Plaintiff insists that both sides' expert reports be served before any expert depositions take place.

"It is generally expected that a plaintiff, as the party bearing the burden of proof, would present his experts' opinions before the defendant is required to disclose his expert, since a defendant's expert typically . . . is presenting rebuttal opinions." *Booker v. P.A.M. Transp., Inc.*, No. 2:23-cv-18 WJ/KRS, 2024 U.S.

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Dist. LEXIS 200621, at *28-29 (D.N.M. Nov. 4, 2024); *see also* Fed. R. Civ. P. 26 advisory committee’s note to 1993 amendment (“[I]n most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue.”). “For this same reason, it is normal . . . that a plaintiff’s expert witness also be deposed before the defendant makes his own expert disclosures.” *Booker*, 2024 U.S. Dist. LEXIS 200621, at *28-29; *see also, e.g., Fulton Fin. Advisors v. Natcity Invs., Inc.*, No. 09-4855, 2016 U.S. Dist. LEXIS 134212, at *1-2 (E.D. Pa. Sept. 28, 2016) (requiring that plaintiff’s experts serve their reports and be deposed before defendant disclosed its experts); *Morgan v. Hanna Holdings, Inc.*, No. 07-803, 2010 U.S. Dist. LEXIS 31367, at *6 (W.D. Pa. Mar. 30, 2010) (approving case management order requiring any depositions of plaintiff’s experts to be completed on or before May 1, 2010 and any defense expert reports to be served on or before May 15, 2010); *Curtis v. Crop Prod. Servs., Inc.*, No. CIV-13-986-R, 2014 U.S. Dist. LEXIS 118005, at *11-12 (W.D. Okla. Aug. 25, 2014) (“The [c]ourt concurs with [d]efendant that it is logical to schedule the deposition of [p]laintiff’s expert witnesses prior to the deposition of [d]efendant’s experts, as [p]laintiff bears the burden of proof and [d]efendant’s expert cannot be expected to rebut opinions that have thus far only been expressed in the report”); *Syed v. Target Corp.*, No. EP-22-CV-00274-FM, 2023 U.S. Dist. LEXIS 141851, at *3-4 (W.D. Tex. July 25, 2023) (“The party with the burden of proof shall be deposed first. Likewise, any of the plaintiffs’ retained

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expert witnesses shall be deposed before the defense experts.”); *Carman v. Bayer Corp.*, No. 5:08-CV-148-FPS, 2009 WL 1919049, at *1-2 (N.D. W. Va. July 1, 2009) (rejecting plaintiffs’ contention that “expert witnesses shall not be deposed until after both sides’ expert disclosures have been filed” and allowing defendants to depose plaintiffs’ expert before defendants’ expert disclosure deadline).

This is also a common practice in MDL proceedings, including in this District. *See, e.g., In re Johnson & Johnson Talcum Powder Prods. Mktg. Sales Pracs. & Prods. Liab. Litig.*, MDL No. 2738, 2024 U.S. Dist. LEXIS 84169, at *1-2 (D.N.J. Apr. 30, 2024) (any depositions of plaintiffs’ experts “must be completed on or before May 17, 2004”; defendants shall designate their experts “on or before May 21, 2024”); *see also e.g.,* Case Mgmt. Order No. 7 (Setting New Deadlines for Track One Cases) at 2, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP, ECF No. 876 (N.D. Ohio Aug. 13, 2018) (Ex. 1) (requiring the plaintiffs in certain designated cases to serve expert reports by February 8, 2019, “and, for each expert, provide two proposed deposition dates between February 18 and March 15, 2019,” with defendants to serve expert reports and provide deposition dates by March 26, 2019) (emphasis omitted); Am. Pretrial Order No. 22 (Second Revised Schedule Regarding Issues Related to Class Certification) at 1-2, *In re Nat’l Hockey League Players’ Concussion Inj. Litig.*, No. 0:14-md-02551-SRN-BRT, ECF No. 605 (D. Minn. Sept. 8, 2016) (Ex. 2) (requiring the plaintiffs to disclose their experts by December 8, 2016 and make those experts available for deposition within 45 days,

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and allowing the defendant until April 27, 2017 to identify its experts); Order Re: Expert Discovery Schedule at 1, *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, No. 2:01-md-01407-BJR, ECF No. 340 (W.D. Wash. Mar. 22, 2002) (Ex. 3) (scheduling deposition of plaintiffs' experts to be completed before defendants' Rule 26 disclosures).

There is no reason to depart from this approach here. After all, the purpose of ZHP's experts' reports will be to refute the substance of Plaintiff's experts' opinions—an exercise that requires the ZHP defendants' experts to consider and respond to plaintiffs' experts' testimony. While Plaintiff's experts' reports will set forth the general parameters of their opinions, it is not until those experts are deposed that the ZHP defendants will be able to adequately test the specific bases for each of those opinions, identify any assumptions upon which those opinions depend, and fully understand the limitations of Plaintiff's experts' theories and conclusions. *See Williams v. Am. Honda Motor Co.*, No. 6:20-cv-00022, 2022 WL 1071463, at *3 (E.D. Tex. Apr. 8, 2022) (“[A] deposition allows a party to fully explore an expert’s findings, thought process, and analysis.”), *aff’d*, No. 22-40224, 2023 WL 3739095 (5th Cir. May 31, 2023), *cert. denied*, 144 S. Ct. 562 (2024). As courts have recognized, information obtained from plaintiffs’ expert depositions is critical to a defendant’s experts’ ability to adequately respond to and rebut a plaintiff’s experts’ assertions. *See Carman*, 2009 WL 1919049 at *1-2 (finding that the defendant was allowed to fully explore “the specific bases for [the plaintiff’s expert]’s opinions” by

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taking the expert's deposition "before being expected to defend against those claims"); *see also* Order at 12, *Franklin v. United States*, No. 1:12-cv-01167-KBM-CG, ECF No. 66 (D.N.M. Aug. 27, 2013) (Ex. 4) (explaining that defendant "was not required to accept [p]laintiffs' experts' reports at face value and was allowed to depose [p]laintiffs' experts before disclosing its own experts").

Similarly, here, the ZHP defendants must be allowed the opportunity to depose Plaintiff's experts before its own experts finalize and disclose their responsive opinions.

Very truly yours,

A handwritten signature in cursive script that reads "Jessica Davidson".

Jessica Davidson